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#12

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In re Application of	:	
LAUK	:	
Application No.: 08/981,924	:	DECISION ON
PCT No.: PCT/DE96/01269	:	
Int. Filing Date: 12 July 1996	:	PETITION UNDER
Priority Date: 12 July 1995	:	
Attorney Docket No.: P2941 WO US	:	37 CFR 1.137(b)
For: METHOD FOR DETERMINING THE	:	
EFFECTIVENESS AND TOLERANCE OF A	:	
XENOGENIC SUBSTANCE ADMINISTERED	:	
TO AN ORGANISM	:	

This decision is in response to the petition entitled "Petition under 37 CFR 1.137(b)" filed 16 May 2000.

BACKGROUND

On 12 July 1996, applicant filed international application PCT/DE96/01269 claiming priority to an earlier German application filed 12 July 1995. A copy of the international application was timely communicated to the United States Patent and Trademark Office (PTO) from the International Bureau. A DEMAND for international preliminary examination, in which the United States was elected, was filed on 05 February 1997. Accordingly, the thirty month period for paying the basic national fee in the United States of America expired at midnight on 12 January 1998.

On 13 January 1998, applicant filed a Transmittal Letter (Form PTO-1390) for entry into the national stage in the United States under 35 U.S.C. 371, accompanied by, *inter alia*, the requisite basic national fee, a declaration of the inventor and an English language translation of the international application.

On 06 April 1998, the United States Designated/Elected Office (DO/EO/US) mailed a "NOTIFICATION OF ACCEPTANCE OF APPLICATION UNDER 35 U.S.C. 371 AND 37 CFR 1.494 OR 1.495" (Form PCT/DO/EO/903) to inform the applicant that all the requirements of 37 CFR 1.495 had been satisfied and that the application was accepted for entry into the national stage in the United States as of 13 January 1998.

ON 06 October 1998, a communication was mailed to applicant, informing that the full basic national fee was not paid by the expiration of the statutory thirty month deadline from the priority day claimed of 12 July 1995. Accordingly, applicant had not met the requirements under 35 U.S.C. 371 and the NOTIFICATION OF ACCEPTANCE OF APPLICATION of 06 April 1998 was issued in error.

On 22 October 1998, the PTO received from applicant a petition under 37 CFR 1.137(a) to revive an unavoidably abandoned application, accompanied by, *inter alia*, the requisite small entity petition fee, a second or subsequent transmittal letter to the DO/EO/US concerning a filing under 35 U.S.C. 371, the requisite surcharge for furnishing the oath or declaration, and the processing fee for furnishing the English translation later than thirty months from the earliest priority date. The petition alleged that the application became unavoidably abandoned due to an unexpected delay in the delivery of the Transmittal Letter and basic national fee to the DO/EO/US.

On 30 March 1999, the PTO mailed a Decision on Petition dismissing applicant's petition to revive under 37 CFR 1.137(a). The Decision indicated that the applicant had not provided evidence of the date and time the papers were delivered to Federal Express and that there was no evidence provided from Federal Express as to how long it should take to deliver a package from Germany to the PTO and therefore applicant did not meet the burden of establishing that the delay was unavoidable.

On 20 May 1999, the PTO received a "RENEWED PETITION TO REVIVE UNDER 37 CFR 1.137(a)" again requesting that the abandonment be considered unavoidable and that the application be revived. The renewed petition included a Federal Express invoice indicating dispatch of a package from Paul J. Vincent in Stuttgart, Germany to the PTO on 08 January 1998 and delivery to the PTO on 13 January 1998. The renewed petition also included a letter from Federal Express indicating that the mail time for a package from Germany to the United States is two work days.

On 12 November 1999, the PTO mailed a Decision on Renewed Petition dismissing applicant's renewed petition. The Decision indicated that there was no evidence that the Federal Express invoice provided corresponds to the 35 U.S.C. 371 application papers received by the PTO on 13 January 1998 and assigned application number 08/981,924 and that the delay is not considered unavoidable because a one day mailing or shipping delay cannot be

considered an unexpected or unforeseen fault or imperfection of the delivery service and the shipment of a package on the last possible day which would ensure its timely delivery service is less than the care or diligence generally used and observed by careful persons in relation to their most important business.

On 27 December 1999, the PTO received a "Request for Reconsideration of Decision on Renewed Petition under 37 CFR 1.137(a)" again requesting that the abandonment be considered unavoidable and that the application be revived.

On 24 March 2000, the PTO mailed a decision dismissing applicant's request for reconsideration of the petition under 37 CFR 1.137(a) indicating that applicant still had not shown to the satisfaction of the Commissioner that the delay was unavoidable.

On 16 May 2000, applicant submitted the instant "Petition under 37 C.F.R. 1.137(b)" accompanied by the requisite petition fee.

DISCUSSION

A petition to revive the present application under 37 CFR 1.137(b) must include:

- (1) The required reply;
- (2) The petition fee;
- (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unintentional.

As to item (1), applicant submitted the full U.S. basic national fee for a small entity on 13 January 1998.

As to item (2), the requisite petition fee for a small entity was submitted on 16 May 2000.

With regard to item (3), petitioner states that the "entire delay in filing the required reply from the due date for the required reply until the filing of a grantable petition under 37 CFR 1.137(b) was unintentional."

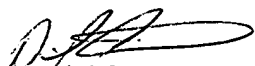
A review of the application file reveals that, with the filing of the present petition and accompanying papers, a proper response has been submitted and all of the requirements of 37 CFR 1.137(b) for revival have been satisfied and revival is therefore appropriate.

The declaration filed 13 January 1998 complies with 37 CFR 1.497(a)-(b). Accordingly, the requirements under 35 USC 371(c) were satisfied as of that date.

CONCLUSION

The petition under 37 CFR 1.137(b) is **GRANTED** for the reasons set forth above.

This application is being forwarded to the National Stage Processing Branch of the Office of PCT Operations to continue national stage processing of the application including according the application 35 U.S.C. 102(e) and 371(c) dates of **13 January 1998**.



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